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One Piece of the Puzzle: A Private Right to Your Image in the Digital Age

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Abstract: This Article argues for the creation of a right in one's image for those up to and including the age of twenty-one. The right, which is justified by the pernicious persistence of digital media over time and space, would allow right holders to prohibit distribution of media artifacts – audio, still image, and video files – that include their image or voice. It is designed akin to moral rights in copyright, and as such is not exploitable for profit as such, but instead allows for those whose images are embedded in digital media to halt distribution or display of those files. Combined with other societal responses to the persistence of digital media, including shifting social norms and additional legal responses, the image right would form one piece of the puzzle designed to mitigate the harshness of life for young people in today's world.

I. INTRODUCTION

In a 2008 book chapter entitled *Growing Up Digital: Control and the Pieces of a Digital Life*,[1] I argued that the digitalization of media content created by individuals (as opposed to media created by media

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[1] Robert A. Heverly, *Growing up Digital: Control and the Pieces of a Digital Life*, in, DIGITAL YOUTH, INNOVATION, AND THE UNEXPECTED 199–218 (Tara McPherson ed., Mass. Inst. Tech. Press 2008) (hereinafter, Heverly, Growing up Digital)

conglomerates) created the potential for digital media to "haunt" those featured in it for their lives in a way significantly different from what was possible in the past. Noting that existing legal structures relating to control over media artifacts—such as copyright or the right of publicity—do not provide protection to most of those people who would appear in digital media artifacts outside of the main stream media, the chapter concluded that culture and law would have to change to avoid the potential for long-term and unpredictable effects on social relations. The chapter was focused primarily on children who were captured by digital media, but the lessons were relevant to adults—and especially young adults—as well.

In this essay, I extend elements of my original argument, and, in so doing, propose a new right of a person in media artifacts that contain the person's image or voice where that person was, at the time the image was made, twenty-one years of age or younger (the "image right"). I will not take on the whole of the implications of such a proposal here. Rather, my purpose is to take a modest step: outlining what such a right might look like, the terms it might include, and the people to whom it might apply. I do not deal with the difficult and complex questions of the constitutionality[2] of such a proposal, nor even with more basic questions such as the authority for its enactment, primarily due to considerations of space. The small step I take here is to identify what the right looks like, building on my past essay that argues something should be done in this respect to mitigate at least some of the harshness that flows from the magnifying glass that the Internet puts on everyday life.

My proposal is not a silver bullet. It is part of a bigger puzzle, one that involves education, a shift in cultural perception and reaction, and additional legal changes designed to assist with finding solutions to the problem outlined here.

I begin by briefly reviewing my previous work in this area, locating it in the context of other work that was being done at that time and that has been done since then, and emphasizing the problem of persistence of media artifacts in the digital age. I turn next to defining the "right in one's image," including identifying the situations in which and persons to whom it would apply. After delineating the right itself, I turn to some of the primary objections that are likely to arise

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[2] When the next step is taken and the constitutional implications are more fully explored, the precise contours of the right as defined herein may need to be adjusted to comport with constitutional requirements. That said, I proceed with the intention that what is here will be defendable within constitutional discourse, and that it in fact will pass constitutional muster.

in response to its creation: that on a practical level it is unenforceable given Internet distribution of content; that it gives too much control to those captured in images and video; and that it would pose too many problems for those who make their living from or who regularly engage in making video, still image and audio media artifacts. I then review how this piece of the puzzle would fit together with existing law and proposals from other scholars. I conclude by arguing for inclusion of the "image right" as a part of society's necessary response to the persistence of digital media artifacts over time and space.

II. THE PROBLEM OF PERSISTENCE

When *Growing Up Digital: Control and the Pieces of a Digital Life* was first published in 2008, little had been said about the changes that digital media creation were bringing to the world given the persistence of digital media.[3] In my chapter, I argued that certain changes brought about by the "digital revolution" created the potential for long-term effects to be felt by those whose images were embedded in digital media objects.[4] Specifically, the ability to create, distribute, store, and find media has changed, making media objects more persistent than they were when media objects were primarily analog. The difference between needing to find a photograph in an old shoebox under the bed and being able to search for and find a video on the Internet illustrates the point strongly. The latter is now more and more possible, and the implications are potentially important in the long-term.

I was concerned with the effects of digital media artifacts showing young people in compromising, embarrassing, or inappropriate situations, doing compromising, embarrassing, or inappropriate things, and how these digital artifacts might later affect their lives, their opportunities, and their relationships. What has brought us here is the technological shift from the rather obscure existence of analog media from our young lives—printed photographs with negatives, VHS video camera footage, audio cassette recordings—to the ubiquitous, easily searchable, connected, and potentially permanently archived digital artifacts created today. I termed this permanence "pernicious persistence," to reflect the notion that these digital media

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[3] *But see, e.g.*, Peter Lunenfeld (ed), The digital dialectic: New essays on new media (Cambridge, MA, MIT Press) (2000) (various essays portending the impending changes to be wrought by the widespread adoption of digital media and digital networks).

[4] Heverly, *Growing up Digital.*

artifacts will have the potential to crop up again and again over time in ways that we will not be able to control and may not be able to escape.

As examples, I used four case studies:

1. A young woman who allows her boyfriend to take sexy photographs of her, and the photographs are later distributed by the boyfriend following their breakup;

2. A young man who makes personal videos for his girlfriend which, following their breakup, are distributed on the Internet;

3. A teacher who is bullied and harassed by students who have discovered a video of him that was made by bullies when he was young, a video he knew was being made when it was made, but which he was powerless to stop; and,

4. A young woman who was bullied by classmates and who was the subject of a hidden camera during the bullying so that she did not know the video was being made.[5]

The case studies show the variety of legal positions of control into which the subject of a digital media artifact might be placed in relation to video made of them. In the first scenario, as the "mere" subject of a digital media artifact, the subject can assert little or no control over the legal fate of that artifact. Absent commercial use, the law places control over digital media artifacts in the authors of those artifacts, not in their subjects. Actors and subjects are not included as authors of those artifacts in these circumstances.

Next, while the young man in the second scenario is the "author" of the digital artifact, or "work" in copyright parlance, a number of exceptions under copyright law are likely to affect his ability to control distribution (in addition to the problems inherent when such media is distributed via the Internet). Scenarios three and four return us to a

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[5] At least one commenter on the original chapter theorized that these examples were purely hypothetical, but two of them—scenarios one and two—were written based on real situations, while scenarios three and four were predicted situations based on the potential shown by digital media artifacts. HEVERLY, *supra* note 1, at

situation in which the media artifact's subject has no control under copyright law and, without commercial use, present unlikely cases for violation of the publicity right. Each of these scenarios may raise privacy concerns, but these are contextual and privacy is not coherent enough to garner protection sufficient to overcome the problem here.

Together with the analysis that followed them, these scenarios make two primary points. First, the shift to digital distribution of digital media artifacts has the potential to significantly affect the way in which we are viewed by and interact with the individuals in our lives and in society as these artifacts resurface throughout our lives in ways that analog media artifacts were unlikely to do.[6] Second, existing law gives the subjects embedded and displayed within digital media artifacts little or no control over the digital media creations in which they are embedded.

Additional case studies have appeared in the news since *Growing Up Digital* was published. One example is that of "the drunken pirate"— a young woman who distributed a picture of herself with a drink in her hand and the caption, "drunken pirate." According to news reports:

> Stacy Snyder, 25, . . . was a senior at Millersville University in Millersville, Pa. . . . Last year, she was dismissed from the student teaching program at a nearby high school and denied her teaching credential after the school staff came across her photograph on her MySpace profile.[7]

Ms. Snyder subsequently sued the University, but lost.[8] This scenario adds a wrinkle to our discussion: how to handle people who

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[6] My initial analysis of the analog problem was short-sighted in that I argued that analog media would not have this effect, but that instead it was limited to digital media artifacts. This oversight was brought to light for me when a high-school friend posted a photograph of me from high school on the social networking site "Facebook." The point? Analog media artifacts, in the hands of individuals or perhaps a few individuals, their existence known by few if any beyond this circle, difficult to distribute and nearly impossible to search, can be made into digital media artifacts through digital technologies such as digital recording of analog video or scanning of printed photographs. The proposal made here, and those made by others, are thus relevant immediately even to those of us who grew up in an "analog world."

[7] Randall Stross, *How to Lose Your Job on Your Own Time*, N.Y. TIMES, Dec. 30, 2007, http://www.nytimes.com/2007/12/30/business/30digi.html.

[8] Snyder v. Millersville Univ., No. 07-1660, 2008 WL 5093140, at *1 (E.D. Pa. Dec. 3, 2008).

have both embedded themselves in digital media artifacts *and* publicly distributed those same files, especially where those people are over the age of twenty-one years at the time they make themselves a part of the media file in question.

How should society react to these scenarios? My conclusion in *Growing Up Digital* was that a number of steps need to be taken in response to the difficulties that young people are likely to encounter when confronted with digital media artifacts in which they are embedded. Initially, cultural attitudes toward images and videos of young people engaged in the kinds of activities in which young people engage need to evolve to accept the existence of these activities and of the digital media evidence of them. Tolerance, understanding, and compassion must increase in relation to any artifacts showing people in embarrassing situations when they were younger.[9]

In addition, it is important that young people be educated not just about the correct use of digital media, in terms of embedding themselves within it and also in terms of embedding others, but they must also be educated as to the long term consequences of their choices in this regard.[10] While this is a difficult concept to grasp, especially for younger children, it is essential that youngsters be told—again and again, over and over—that digital media does not easily go away, and what might seem funny today might be life-changing in a negative way tomorrow. These lessons should be taught at the youngest ages that maturity levels and intelligence allow and should be reinforced as children travel through school.[11]

Finally, I briefly suggested that a right to one's image be used to provide people with the ability to control the distribution of digital media that contain their image or voice made when they were minors. I argued, "[a]dopting either a German style 'control over image publication' right for minors . . . or even a copyright-style distribution right in favor of children who are the subjects of digital media artifacts, is one possible step."[12]

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[9] HEVERLY, *supra* note 1, at 215.

[10] This is not a new argument. Fred Cate made it as well in his 1997 book, *Privacy in the Information Age*, noting that users may need education to become aware of the operation and effects of using computer related technologies: "One must learn about the often invisible actions of software and hardware by reading instruction manuals and help screens, finding resources . . . in print or on the Internet, and perusing the fine print . . ." FRED CATE, PRIVACY IN THE INFORMATION AGE 103 (Brookings Institution 1997).

[11] HEVERLY, *supra* note 1, at 214.

[12] *Id.*

While I was writing and publishing *Growing Up Digital*, Viktor Mayer-Schönberger was preparing his book, *Delete: The Virtue of Forgetting in the Digital Age*.[13] Identifying similar concerns as *Growing Up Digital*, Mayer-Shönberger—emphasizing the "drunken pirate" scenario noted above—argues for the importance of "social forgetting" and laments its potential loss through technological methods.[14] Since then, other legal scholars have added their voice to the growing chorus, suggesting potential legal changes that might help recapture the forgetfulness that was prevalent in the analog age.[15]

Directly on point with the concerns raised in *Growing Up Digital*, Jonathan Zittrain's *The Future of the Internet and How to Stop It*, argues for a policy called "reputation bankruptcy," in which people are able to "wipe clean" their electronic history in certain categories.[16] The idea is to give people a "second chance" in relation to some of their electronic history. A similar solution that amplifies this notion was suggested by Google CEO Eric Schmidt in the *Wall Street Journal*, where he "predicts, apparently seriously, that every young person one day will be entitled automatically to change his or her name on

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[13] VIKTOR MAYER-SCHÖNBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE (Princeton Univ. Press 2009).

[14] *Id.*

[15] Another proposal is tangentially related here. It responds to the near absolute protection given to Internet Service Providers that has immunized them when users post defamatory material (such that defamatory material might remain online even if a court finds it is defamatory). *See* 47 U.S.C. § 230. Cass Sunstein suggests in his book *On Rumors: How Falsehoods Spread, Why We Believe Them, What Can be Done*, that this strong protection be tempered somewhat so that individuals would be given a "right of retraction" entitling them to have such content removed from the Internet. This would not aid those who have materials posted about them that are true, nor would it help in the case of those unable to win a defamation lawsuit due to their public figure status, but would fix what many see as a bug rather than a feature of current law. It strikes as well at the problem of pernicious persistence, the idea that what ends up on the Internet has the potential to stay on the Internet, where it contributes to unnecessary and perhaps unfair trouble for those it portrays. CASS R. SUNSTEIN, ON RUMORS: HOW FALSEHOODS SPREAD, WHY WE BELIEVE THEM, WHAT CAN BE DONE 78 (Farrar, Straus and Giroux 2009).

[16] JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 228–29 (Yale Univ. Press 2008); *see also* Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES, July 21, 2010, http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html, describing the "Vanish" technology.

reaching adulthood in order to disown youthful hijinks stored on their friends' social media sites."[17]

In a similar vein, technological and marketplace solutions have been developed to overcome the same kinds of problems as those presented by the pernicious persistence of digital media artifacts. Firms such as Reputation.com, Reputation Hawk, and Visible me all offer services to help people try to remove or "play down" those negative media elements through the use of online strategies such as building a strong online persona or optimizing search engine results to push negative results down below more positive results.[18] Technological forays are also being made into what is seen as the void of eternal permanence of digital media artifacts—the pernicious persistence I referred to in *Growing Up Digital*.[19] One attempt is to give digital artifacts an end or expiration date, such that they would degrade over time and eventually be unrecoverable.[20] Finally, at least one author has provided a method of disappearing from the grid altogether in a book entitled *How to Disappear: Erase Your Digital Footprint, Leave False Trails, and Vanish without a Trace*.[21] All of these efforts, including scholarly proposals and technologies, popular how-to guides, marketplace solutions and popular press reports and accounts,[22] focus, to some degree, on providing a second chance, that is, removing portions of an online life from the prying eyes of anyone who would wish to see it.

Everything in this realm is not about erasing history. Jeffrey Rosen recently gathered a variety of the proposals together and discussed them in the *New York Times*.[23] As noted by Professor

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[17]Holman W. Jenkins Jr., *Google and the Search for the Future*, WALL ST. J., Aug. 14, 2010, http://online.wsj.com/article/SB10001424052748704901104575423294099527 2 12.html.

[18] *See, e.g.*, Reputation.com, http://www.reputationdefender.com (last visited Apr. 27, 2011); Reputation Hawk, http://www.reputationhawk.com (last visited Apr. 27, 2011); Visible.me http://visible.me/ (last visited Apr. 27, 2011).

[19] Heverly, *Growing up Digital*, at 200-201.

[20] *See* Roxana Geambasu et al., *Vanish: Increasing Data Privacy with Self-Destructing Data* (2009), http://vanish.cs.washington.edu/pubs/usenixsec09-geambasu.pdf.

[21] FRANK M. AHEARN & EILEEN C. HORAN, HOW TO DISAPPEAR: ERASE YOUR DIGITAL FOOTPRINT, LEAVE FALSE TRAILS, AND VANISH WITHOUT A TRACE (Lyons Press 2010).

[22] *See* Rosen, *supra* note 13.

[23] *See id.*

Rosen, some proposals would not erase, but would instead seek to mitigate the effects of what others would see about a person online.[24] Rosen notes that Paul Ohm has suggested that employers be forbidden from making hiring and firing decisions based on online content.[25] This would work to preclude "Googling" as a step in the pre-employment screening process, as well as preventing it from playing a significant role in the continued employment process. Where decisions are made based not on job performance, but rather on activities, images, or opinions stated online that do not relate to the job, the employer would be forbidden from acting on them to preclude or release the employee in question. This approach would allow societal and cultural effects such as being shunned by friends or tormented by co-workers, but would hope to avoid the hardest hitting of the potential effects of the permanence of digital media: financial implications.[26]

In addition to legal strategies, almost all of the authors who have approached the problem of pernicious persistence—myself included—have noted that a shift in how individuals, societies, employers, and governments respond to portrayals of mistakes, errors, and poor judgment is required given the problems of pernicious persistence, however that persistence is defined in the various scholarly pieces that address it.[27]

These proposals are not mutually exclusive. The law could provide for reputational bankruptcy while still precluding employers from using non-work-related media found on the Internet in hiring and firing decisions. Integrating the notion of a cultural shift in perception, especially as it relates to youthful indiscretions, is also part of the solution. Together, we can conceive of a toolbox of options from which to choose in an effort to mitigate and respond to the pernicious persistence of digital media.

The various proposals and possibilities each make up one tool in the toolbox of potential responses to the problems posed by pernicious persistence. It is as part of this toolbox of potential solutions that the notion of a private right in one's image is proposed. The right would not supplant any of the above suggestions, nor would it override the

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See, e.g.*, Rosen, *supra* note 13 and Zittrain, *supra* note 15.

nearly uniform perception of scholars that culture and society must adjust to the changes that the creation of digital artifacts has wrought, in continuing to bring to our memories, and to our understandings, of who we are. Rather, it is simply one piece of the puzzle.

Before we proceed, one final factual scenario will help us understand the implications of control in the digital age and emphasize the discrepancy between those with control over media artifacts and those without. It involves the artist Larry Rivers, who, over a period of many years, filmed the ongoing "development" of his daughters as they matured. This resulted in raw footage and an explicit film, including close-ups of the girls' genitals and breasts and probing and intrusive questions asked by Rivers.[28]

> One daughter, who said she was pressured to participate, beginning when she was 11, is demanding that the material be removed from the archive and returned to her and her sister.
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> "I kind of think that a lot of people would be very uptight, or at least a little bit concerned, wondering whether they have in their archives child pornography," said the daughter, Emma Tamburlini, now 43.
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> Ms. Tamburlini said the filming contributed to her becoming anorexic at 16. "It wrecked a lot of my life actually," she said.[29]

This is the quintessential case of being embedded in a media artifact and having no control over the course of its distribution.[30] It is complicated by the involvement of a father. While NYU, the university that holds the archive including the films, has pledged to keep them private so long as the daughters are alive, it is under no legal

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[28] Kate Taylor, *Artist's Daughter Wants Videos Back*, N.Y. TIMES, July 7, 2010, http://www.nytimes.com/2010/07/08/arts/design/08rivers.html.

[29] *Id.*

[30] *Id.* At this point, the films are held as part of an archive sold by the Larry Rivers Foundation to New York University. The university has pledged to keep the videos "off limits" while the daughters are still alive, and is in discussions regarding the fate of the films beyond that time.

obligation to do so.[31] The daughters—who do not own the copyright to the works and do not hold the physical copies in their control—have no clear legal right to demand that the films not be shown. While Rivers's films were analog, the concerns they raise are made more acute, not less, by the pervasive persistence of digital media in the Internet age.[32]

III. ONE PIECE OF THE PUZZLE: A RIGHT IN ONE'S IMAGE

The solution to the problem of the pernicious persistence of digital media is a complex one. There is no silver bullet answer, but even so, something must be done to assist and acknowledge those who are affected by the pernicious persistence of digital media artifacts. That such artifacts can be easily made and distributed, and then later—perhaps much, much later—be located, identified, and redistributed must be addressed by society. Legal aspects of society's response are not only important, they are an essential element of the answer to this problem. The effect this situation has already had is notable, and it is likely to increase in the future given continually decreasing costs of media creation and the increasing effectiveness and sophistication of storage, searching, and distribution.

Mayer-Schönberger, Zittrain, and Ohm, among others, have all made proposals relevant to society's response to the difficulties raised by the persistence of digital media, arguing for some form of digital forgetting.[33] Technology is being created with a similar goal.[34] It is only with a variety of potential responses, all with independent support in law and culture,that the victims of the pernicious persistence of digital media artifacts can overcome the changes brought about by cheap creation and distribution of digital media files.

I turn now to defining the image right itself. German law provides a useful backdrop against which to consider the problem of persistence. Specifically, the German concept of the right of personality includes a right allowing a person pictured in an image to object to its dissemination or public exhibition, as follows:

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[31] *Id.*

[32] *Id.*

[33] *See,* Mayer-Schönberger, *supra* note 13; Zittrain, *supra* note 16; Rosen, *supra* note 17.

[34] *See,* note 20, *supra,* and accompanying.

§ 22 KUG.

> Pictures or portraits may be distributed or displayed only with the consent of the person portrayed, i.e., the subject. In cases of doubt, consent is considered to have been given if the person portrayed has received a consideration for allowing himself to be portrayed. When the subject dies, and for up to 10 years thereafter, the consent of the next of kin is required. Next of kin within the meaning of this law are the surviving spouse and children of the subject and, if neither the spouse nor the children are alive, the parents of the subject.

§ 23 KUG.

(1) The following may be distributed or publicly displayed without the required consent according to § 22:

   a. Pictures within the realm of contemporary history;

   b. Pictures in which the persons appear only incidentally in a landscape or other location;

   c. Pictures of meetings, receptions, processions and other gatherings in which the persons portrayed have participated;

   d. Pictures that have not been produced by order or request, but whose distribution or display would be in the higher interests of art.

(2) Consent does not however extend to distribution and display in which the legitimate

> interests of the subject or the next of kin are infringed.35

The German image right is provided to everyone and does not vary with age.[36] It presumes consent to the creation and distribution of the image (and the embedding of the person within it) in cases where one was paid to be included in the image, but note that this would not necessarily include the right to use the image for those purposes to which the person so pictured did not consent.[37] In addition to the notion of the right itself and its requirement of consent, the statute creates a series of exceptions to the prohibition on non-consensual distribution, and then tempers those exceptions where their application would injure another interest of the person pictured (or, if deceased, the person's relatives).[38]

Returning to the image right being proposed here, the German law's provisions serve as a model, though they will be modified to better achieve the goal outlined above. For our purposes, the definition of the "Image Right" is proposed here as follows, though for completeness, the entire law as proposed is reproduced here, with each section being discussed below:[39]

> § 1. Pictures, portraits, videos, films, audio recordings, or other media objects in which a person's likeness or voice can be perceived either visually or aurally may be played, displayed, distributed, broadcast,

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35 Susanne Bergman, *Publicity Rights in the United States and in Germany: A Comparative Analysis*, 19 LOY. L.A. ENT. L.J. 479, 501, note 207 (1999). *See* Harry Krause, *The Right to Privacy in Germany—Pointers for American Legislation?* 1965 DUKE L.J. 481, 486, note 19 (1965), (including provisions of an earlier German statute, translation by Krause).

36 *Id.*

37 *Id.*

38 § 23 KUG. (2).

39 The provisions outlined in the proposed law are drafted as a first attempt to meet both practical and legal requirements relating to the right being granted to the subjects of media artifact creation. They have not been largely vetted and are subject to further amendment as the project progresses into the next stage. While this essay cannot hope to address the constitutional implications of the proposal in the space allowed for, the implications still guide aspects of the proposal's form and content, and this section provides an escape valve that may assist in overcoming free expression objections to the right itself.

communicated, or performed only with the consent of the person (the subject) whose likeness or voice is contained within it where that person, at the time the media object was created, was twenty-one years of age or younger.

§ 2. For purposes of § 1:

a. Consent is presumed where the subject was paid to be included in the media object and a parent or guardian who was not a participant in the creation of the media object and who did not benefit directly by its creation consented to creation of the media object;

b. Consent may be implied by the facts and circumstances surrounding the creation and distribution of the media file where the subject at the time of distribution is over the age of twenty-one years, but such implied consent may be revoked by the rights holder at any time. Circumstances implying consent may include that the subject knew of the media artifact's creation at the time of creation or thereafter, knew that his or her image or voice was included therein, knew that the file was being or was to be distributed, and did not object to its distribution.

§ 3. Exceptions: The following media objects may be distributed without the subject's consent pursuant to § 1:

a. Media objects portraying current news and events;

b. Media objects portraying the participants in historical context;

c. Media objects in which the subject's inclusion is incidental;

d. Media objects portraying participation or performances in sporting activities;

> e. Media objects currently being publicly distributed by the subject him or her-self or pursuant to his or her consent;
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> f. Media objects distributed as part of an educational disciplinary process or as part of a criminal or regulatory investigation so far as needed for that process or investigation;
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> g. Media objects portraying the subject's voluntary participation in role-playing in organized theater, film, television, concert, or musical productions; and
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> h. Media objects portraying the subject's voluntary participation in official educational functions, such as graduations and assemblies.

Section 1 expands on the German definition at the same time that it confines it. By including not just images but also all types of multimedia files, it captures the artifacts that are of concern to us here and provides for the subject's right to object to their distribution. It also limits that protection to images, voice recordings, or renderings in which the subject was twenty-one years of age or younger, excluding adults from its protections, and where the person cannot be recognized in the media artifact.[40] This latter portion is based on the overriding reasons justifying the creation of the right: young people should be able to experiment, grow, learn, and gain experience without recordings or images of those natural processes coming back to "haunt" them at a later date as they grow into adulthood.[41]

The law often recognizes a distinction between adults and children, imposing differing levels of punishment on them for crimes.[42] While the provision here is more clear cut—criminal law and

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[40] It does this through the use of the word "likeness," which, within this context, would include situations where there is a likelihood that if viewed by people familiar with the subject, the subject would be recognized as being the person portrayed or recorded within the media object.

[41] *See* HEVERLY, *supra* note 1, at 209–11.

[42] *See, e.g.*, John Burrow, *Punishing Serious Juvenile Offenders: A Case Study of Michigan's Prosecutorial Waiver Statute*, 9 U.C. Davis J. Juv. L. & Pol'y 1, 8 (2005)(discussing the manner in which juveniles can be removed from the juvenile justice system and placed in the adult justice system).

tort law, as examples, often vary their application as a child grows older—the perception is that some of the gravest dangers lie in wait for young adults who are first exposed to the taste of adulthood, those who are seen as being most likely to be captured in digital media artifacts,[43] and thus potentially have the most to lose.

In section 2, the German notion that consent should at times be presumed is also carried across.

Paragraph "a" of section 2 would act to "save" the creation of professional and commercial media content that is intended, at its making, for distribution, that is, commercial or independent films, photography, and audio works. Absent such a provision, the film industry would be thrown into uncertainty as to a child star's future wishes about film distribution every time a child was included in a film. In addition, it allows commercial media operations of all kinds to act with certainty so long as they obtain consent of the parent or guardian to the distribution of the file at the time it is created and the child is paid for participation in its creation.

Paragraph "b" acknowledges that many people will not object to the distribution of their image or voice, and, as such, provides for implied consent where the circumstances warrant it.

The inclusion of exceptions is necessary in the context of the problem that is raised by the persistence of digital media artifacts. To that extent, the German law again provides a basis upon which to build, and the elements in section 3 provide us the necessary leeway to implement the image right without unnecessarily stepping on other legal rights and privileges.

News and events exclusions and historical context exclusions are necessary to prevent one individual from controlling public discourse, especially in a society where popular culture is often dominated by the cult of the personality. Where young people throw themselves into the spotlight, this provision will not assist them in maintaining a false image of themselves for public consumption. The "incidental inclusion" language is provided so that people "in the background" of images, videos, and sound recordings cannot exploit their incidental inclusion to extort payments from media producers and creators without sufficient cause. Media objects may provide evidence of disciplinary violations or crimes. As such, it would be inappropriate to forbid their distribution in such proceedings or investigations. Doing

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[43] *See, e.g.*, Amanda Lenhart *et al*, Social Media & Mobile Internet Use Among Teens and Young Adults, Pew Internet & American Life Project (February 3, 2010); http://pewinternet.org/Reports/2010/Social-Media-and-Young-Adults.aspx

so would potentially undermine important processes and make the administration of schools and of the justice system unnecessarily difficult, and allow the subject to create false realities that are potentially unfair or unjust.[44]

Related, but distinct, is the exception for media objects that show students or other young people in organized role-playing activities, such as when they sing in a chorus, play in a school orchestra or band, or act in a school or community play. Though on a smaller scale, the concerns here are similar to those in the commercial media market: that one person who participated in such an activity will later use their youth to try to prevent everyone who participated in the activity from being able to enjoy the fruit of their labors. Where, as here, there are other protections in place to prevent serious damage from flowing out of such activities—and the school system or community activities structures are likely to provide just such protections—the subject has no right to rely later on a provision intended to protect his or her image from inappropriate use or exploitation with an intent to harm.

Participation in sports activities and events would also fall under this section. In such circumstances, the video of a track and field race need not be edited to remove a particular subject who has lost the race. Rather, losing is part of childhood and the image of that loss is not something from which a subject needs protection either when it is recorded or later in life.[45] The same is true for voluntary participation in graduations and educational assemblies, where the image right would be inapposite.

An exclusion for media objects that are being distributed by or with the consent of the subject is also proposed and further distinguishes this right from other potentially similar rights, such as copyright.[46] These provisions are about control over your image in

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[44] That is, the person who is the subject of a disciplinary proceeding may be able to "pretend" that they did not take a particular action simply because the image right would otherwise, without this exception, allow them to preclude use of the relevant image during the disciplinary proceeding.

[45] But note that if, during a play, a young man was "pantsed" (had his jeans pulled down by another actor) without warning, in a way that was not part of the play, the distribution of a video recording including that portion of the play, that is, the unplanned and inappropriate embarrassment of the subject, could be enjoined, as the subject's participation in that aspect of the play would not have been voluntary as required by the exception.

[46] Copyright Law allows copyright holders to license both people and the uses to which those people can put a particular media object. *See, e.g.*, 17 U.S.C. §106 ("the owner of copyright under this title has the exclusive rights to do *and to authorize* any of the following [acts]." (emphasis added)

distributed media files, not about controlling how or when those files are distributed if the subject allows distribution. If distribution is allowed by one, then all distribution by any person is allowed so long as consent is continued for that one. There is no way under the statute to allow for distribution by one but not others. While such commercialization may be possible under copyright law, where the subject is not also the copyright holder, the image right will not step in and provide this additional level of economic control.

Throughout the proposal there is no provision for control over the use of the media object beyond the subject's ability to consent to its distribution (viewing the term "distribution" widely to include the various forms included in section 1). This analogizes the right not to an economic right—one that would provide sufficient control in the subject to commercialize and benefit monetarily from the work itself—but rather to a moral right,[47] one that allows a person to control how their "media youth" affects them as adults. It is thus an "on or off" proposition: the adult either consents to distribution of media artifacts in which they are embedded as youthful subjects, or they do not. Relief provided would therefore appropriately be injunctive: ending distribution of the file. Damages would not be appropriate absent, perhaps, repeated and willful violations of the right by the defendant, and then the damages would be primarily punitive, not compensatory. Overall, the proposed law would provide those who have themselves been embedded as subjects in digital media the legal right to object to and stop distribution of most but not all of the media artifacts in which they are included.

Before moving on, an aside on two points is necessary. First, the law would prohibit only the distribution of visual or auditory media objects, not textual media objects.[48] If a young person (under the age of twenty-one) was the subject in a video recorded at a Ku Klux Klan rally, the young person could, if desired, prohibit distribution of the portions of that video that include their image. The subject could not, however, block textual descriptions of what was seen in the video or what occurred at the rally. For someone who has a public presence, such as a well-known actor or a politician, the dilemma would be

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[47] *See* Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Paris Act of Jul. 24, 1971, *amended* Sep. 28, 1979. *See also* Roberta Rosenthal Kwall, *"Author-Stories:" Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. Cal. L. Rev. 1 (2001); ELIZABETH ADENEY, THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS 1–2 (Oxford Univ. Press 2006).

[48] *See*, note 42, *supra*, and accompanying text.

clear. If they blocked distribution of the video itself and then claimed that it didn't exist, the putative distributor could ask them publicly for permission to distribute the video. If they decline, it will be seen as an admission that the video exists. If they say publicly that they would allow it but continue to use the legal process to block distribution, a court might imply consent from their public actions (as contrasted with their private interactions with the distributor). As such, speech itself is not stifled, but is instead shifted from image to text, a point that will become more important when the constitutional analysis of the provisions of the right is more fully explored in a future article.

Second, the proposal as outlined at this point might be adopted by either the federal government or a state.[49] There are provisions in the laws of each that might serve as appropriate precedents for adoption of such a right. That said, as with the constitutional implications, the shortened length of this essay precludes both the discussion of the contours of the right and the basis for its adoption. This issue, along with the free expression aspects of the right, will need to await future review.

If we consider the proposal in relation to our case scenarios, we note that it would reach five of the six case studies outlined above. Only the "drunken pirate," who posted her own photo on her MySpace page would be excluded from protection given the confines of the right and the exceptions created. Initially, Ms. Snyder posted the image that caused her problems herself. No other person needed to redistribute or otherwise pass on the image to cause her problems. Assuming that some additional distribution took place as part of the disciplinary process at her university, it would be shielded by the exception contained in section 3(e). The exception in section 3(e) would apply only so long as Ms. Snyder continued to distribute the file herself on MySpace (or elsewhere).

Aside from the drunken pirate, the remainder of our scenarios would easily fit within the protection provided by the right, allowing subjects who are haunted by media objects to argue for a legal right to have their persecution or victimization halted. Tellingly, the right would quite easily reach the dilemma raised by Larry Rivers's creation of a film documenting his daughters' growth. The daughters are

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[49] Consider, for example, state rights of publicity, *see, e.g.*, N.Y. Civil Rights Law § 50, or federal prohibitions against the making and distribution of "bootleg" recordings of live concerts, 18 U.S.C. § 2319A. While both avenues have their pitfalls—for example, the right of publicity ordinarily focuses on the use of an image in commercial speech and the federal anti-bootlegging statute is a criminal law—they are at least considering in much greater detail in future scholarship.

clearly captured within the film itself, which would prohibit distribution unless either consent can be implied under section 2 or an exception under section 3 applies.

In the Rivers scenario, the consent provisions in section 2(a) would not rescue the NYU archive from the right's scope as the daughters were not paid to participate in their father's "project" (section 2(b) would also not apply here as the daughters have already objected). Under section 2(a), consent would not be implied beyond its explicit terms to allow an implication of consent, as such an implication—along the lines of "they appeared in the film and participated in its creation"–might seem plausible. It is exactly this kind of argument—that the subject knew the media object was being made—that the law is designed to protect against. That is to say, the inability of the young person to properly consent, to assert themselves against the appearance of consent that comes from active participation, is a main part of the basis of the law itself. Protecting against a young person's inability to fully comprehend the potential long-term effects of their decisions is the critical element in precluding their continued victimization from their use in media objects. Allowing a generalized theory of consent to form the basis for a defense to assertions of the right would undermine its primary purpose, and so the definition of consent limits its application by providing a much narrower exclusion for consent aimed at commercial uses of child actors and performers. Thus, Rivers's daughters would be able to argue for application of the right without the danger that their apparent complicity—and note that this complicity is apparent only—somehow immunizes the film against their rights under the proposed law.

In addition, none of the exceptions would apply in this case. While section 3(f) may appear a likely candidate, it should be read to apply only to media objects created of other performances themselves, such as plays or television skits, that is, media objects created of the young person's other entertainment activities, not an object created focusing on the subject him or her-self. That is, the daughters were not playing a role, they were being embedded in the media as themselves. This again is the primary kind of "use" of a person in media artifacts that is intended to be reached by the right.

IV. NON-LEGAL OBJECTIONS

As noted above, there are likely to be substantial objections raised to any proposal such as the one presented here. Some will be primarily legal. That is, that the proposal would violate the protection of

freedom of expression under the federal or state constitutions, or that it is preempted by the federal law of copyright, which provides at least one similar right and arguably limits Congress's power to enact provisions intended to encourage the production of creative goods (rather than protecting some notion of subjects' control over media objects in which their images are embedded). Such concerns are too substantial for an essay of this length, and therefore these legal questions are postponed for the time being to future work (currently in progress).

This reality does not mean, however, that I must put off discussion of all objections, as there are likely to be practical, technological, and social objections to the proposal as well. The primary objections along these lines are: that the existence of a right such as this would be ineffective given the distribution power of the Internet and the ability of distributors to remove the means of distribution from the jurisdiction of the relevant law (and that it would in fact reinforce the negative effects of distribution by focusing attention on the very media object the subject hopes to control); that it gives too much control to subjects of media artifacts who happen to be young when they are made (especially in contrast to adults who fall outside of the twenty-one year age limit); and, that it will create severe problems, large-scale inefficiencies, and uncertainty in the creation of media objects in a way that runs counter to the needs and desires of society.

The first objection is probably the strongest: that is, that without a method of perfect enforcement, the nature of the Internet as a decentralized method of distribution will lead to the media object in question receiving greater distribution in response to assertion of the right rather than less, as the object is replicated on multiple servers in varying jurisdictions. Some of these servers may not be subject to the jurisdiction of courts in areas where the right can be asserted. That is, asserting the right may have the opposite effect of that sought. Within Internet circles, the unintentional escalation of publicity for a work that someone wishes to downplay is known as the "Streisand Effect."[50] According to a *New York Times* article:

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[50] The dilemma is making its way into the legal literature as well. As one student notes, many Internet involved entities are "aware of what has come to be known as the *Streisand Effect*. The idea of the Streisand Effect is that the filing of lawsuits in an attempt to protect privacy often has the opposite effect of that which was intended. Instead of making the problem go away, the lawsuit draws unwanted attention to the issue, making it more popular and bringing it further into the public consciousness than it otherwise would have been." Doug Meier, Note, *Changing with the Times: How the Government Must Adapt to Prevent the Publication of its Secrets*, 28 Rev. Litig. 203, 217 (2008) (citations omitted) (emphasis in original).

> [T]he Streisand Effect [is] a phenomenon on the Internet where an attempt to censor or remove a piece of information backfires, causing the information to be widely publicized. It owes its name to Barbara Streisand's unsuccessful legal efforts to suppress the publication of photos of her Malibu house; this campaign only brought more Internet publicity to her private life. Recent victims of the Streisand Effect include the Church of Scientology (trying to suppress a video of Tom Cruise speaking about the church), the Swiss bank Julius Baer (trying to suppress documents alleging the bank's complicity in asset hiding and money laundering), and the Russian oligarch Alisher Usmanov (trying to suppress criticism and juicy biographical details of his early life that appeared on British blogs).[51]

Add to the general notion of the Streisand Effect the various jurisdictions into which media objects might flee and the efficacy of any right given to subjects embedded in media artifacts seems more hopeless still.

There are a number of points to make in response. First, regardless of the efficacy of any particular piece of legislation, legislation itself makes a statement as to a society's or culture's accepted practices. In other words, it is worth saying even if it is not strictly controllable and enforceable in every case. It emboldens the rights holder and puts the unlawful distributor on the defensive, forcing them to "run and hide" as it were. It delegitimizes the practice of trading on people's visual or auditory misery and will force large scale commercial operations to abandon any pretense of marketing or commercializing content of this type.

This latter point plays into another part of the response: while it will not always be enforceable or even wise to seek enforcement, there are times that it will be enforceable and when defendants will be within the confines of the relevant jurisdiction and subject to its orders. There will be times when content developers and providers will need to respond to the concerns of those who appear as subjects in the media objects in which they traffic. Some content providers and media object traffickers will choose to respond, most likely out of

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[51] Evgeny Morozov, *Living with the Streisand Effect*, N.Y. TIMES, Dec. 26, 2008, http://www.nytimes.com/2008/12/26/opinion/26ihtedmorozov.1.18937733.html.

concern for the reaction of their customers and society at large if they do not, while others will respond only in the face of litigation and potential legal sanctions. In any event, while the right will not be perfectly enforceable, it will also not be perfectly unenforceable. When combined with the statement that the creation of such a right makes on a social and cultural level, the benefits of the right outweigh the potential negative effects that a lack of perfect enforceability will bring to these concerns.

The second objection is that such a right gives too much control to individuals over the dissemination of works in which they appear. Yet, authors of works under the Copyright Act have substantially more rights over works they create than subjects would be given here. It is possibly no more than an accident of history that the rights granted to those who appear in media artifacts are given little or no control over those artifacts, while those who the law views as "authors" receive all the economic and moral desserts. In addition, as noted below, there are times that individuals who did not author a work under the Copyright Act[52] are given the opportunity to decline to allow others to work with the part that they have put into a media object. This arises both in terms of the right of publicity[53] as well as the right to stop unauthorized recording and distribution of live concerts (even where the underlying work being performed is not copyright protected).[54] The right here is narrow: simply the right to stop distribution. No further rights along the lines of copyright are granted or anticipated, and no further extensions are required to achieve the goal here of empowering individuals who appear in media artifacts to be able to exercise some control over the artifacts in which their under-twenty-one-year-old selves appear. Thus, while the image right might preclude use of an image by one who wishes to use it, it will not in practice create a greater or stronger right than those that already exist in relation to the use and distribution of media artifacts.

The final objection can also be met. Considering the exceptions that are built in to the process, professional and even amateur media creators will be able to adapt to make certain that their works fall within one of the agreed exceptions. Where they do not, they will run

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[52] 17 U.S.C. § 101 *et seq.*

[53] i Paula B. Mays, *Protection of a Persona, Image and Likeness: The Emergence of the Right of Publicity*, 89 J. Pat. & Trademark Off. Soc'y 819, 820 (2007).

[54] *See* 18 U.S.C. § 2319A. Unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances.

the risk that a young person featured within them will object to their inclusion on an ongoing basis. That will be the price of participating in the relevant markets, and is a feature, not a bug, of this design. That is, where an exception does not clearly apply, market players will be hesitant to expend resources developing media objects that may, in the end, not be legally distributable. Working within acceptable models and implementing appropriate business practices will allow "above board" media entities and creators to continue to create. Those who wish to "fly below the radar" run the risk that the plug will be pulled on their efforts by someone under the age of twenty-one who appears in their media objects.

IV. ONE PIECE OF THE PUZZLE

Given the above, a brief look at how the right "fits" into existing law and other proposals for addressing the problem is the final step we need to take. The task as related to existing law was previously—although equally briefly—undertaken in the *Growing Up Digital* chapter, and so will not be belabored here.

Copyright law can and will continue to be useful in relation to media artifacts that feature the author as a subject. In such a case, the image right would supplement copyright law, giving the author and subject additional control over when and how the work is utilized and distributed. The image right would not trump copyright provisions, and there would be no need for copyright provisions to trump the image right. They would work in tandem in such situations, allowing for a fuller vindication of the rights of the subject and author.

The right of publicity, on the other hand, is at the same time a smaller and a larger version of the image right. It is more limited in that it applies only to commercial exploitation of an image, but it is broader in that it applies to more than just persons who are twenty-one years old or younger. Thus, it is another piece of the puzzle that fits well with the image right. Where one was under twenty-one years of age when the media artifact was created, the image right will probably be the stronger right, as it does not require a commercial use to come into play. Where the subject was older than twenty-one years of age at creation, the right of publicity will step in to prevent commercial use of the person's image in appropriate circumstances.

The alternative proposals for dealing with the concerns raised separately by Professors Mayer-Schönberger, Ohm, and Zittrain also fit well beside the image right as tools to be able to manage the issues that arise due to the pernicious persistence of digital media across space and time. The image right directly aids Professor Mayer-

Schönberger's calls for a renewed cultural discussion on our reaction to the things that we can dig up in cyber-space. An image right would set the standard as saying, "these things, in relation to young people, are not for public consumption. They are aspects of growing up, part of normal life, and we will not dwell on them." Professor Zittrain's "reputational bankruptcy" is also a complementary tool to the image right, though much stronger in terms of its outcomes. Used in extreme cases, it would provide a much needed backstop for those who need a wholesale approach to overcoming youthful indiscretions stored, indexed, and distributed over the Internet.

Not all of the proposals need to be made part of the toolbox, however. The even more extreme example of reputational bankruptcy suggested by Google CEO Eric Schmidt—an automatic, complete breaking of personality, name, and personhood at the age of twenty-one to overcome "youthful indiscretions"—seems unlikely for two reasons (though obviously would obviate the need for an image right tailored to that same age grouping). The first objection to Schmidt's idea is that it would be too easy to reconnect someone's new persona to their old, making the entire process futile. The second is that many (most?) people would probably be unwilling to sever themselves from family, friends, and hard-earned positive reputation they have gained through the first twenty-one years of their lives, even when their record also contains difficult or embarrassing elements. An "automatic" renaming would vitiate any effort to retain the good, leaving little or no way of carrying positive achievements forward without jeopardizing the entire process.

Contrast Schmidt's position with that of Professor Ohm: Professor Ohm's suggestion that employers be prohibited from essentially spying on prospective or existing employees again complements the image right quite well. Where the image right would apply, it still would not preclude an employer from making decisions based on media objects that were publicly distributed prior to the subject taking action to have them removed. Where a person is worried about the effects media objects from their youth may have on their adult job prospects, they can use the image right to remove media artifacts containing potentially damaging images from public distribution. Where they are older, or the media objects are covered by one of the exceptions, they would still be able to prevent an employer from relying on private actions of employees when making job related decisions.

Thus, the image right fits well in the toolbox alongside existing and proposed responses to the persistence of media artifacts. Together with the notion that culture and society must become more

compassionate and understanding, these tools can help aid those who would otherwise be haunted by literal visions of their past.

V. A NEED FOR ACTION, A NEED FOR REVIEW

Regardless of agreement or disagreement with this particular proposal, one thing is certain: action must be taken to deal with the effects that the permanence and search-ability of digital media files will have on individuals as they are growing up. How we do that is a necessary mixture of legal and cultural norms. The image right is one piece of a puzzle that would allow those people whose youthful activities have been caught "on tape" to overcome the stigma that might flow from those media objects following them throughout their lives. By offering the protection of a legally enforceable right, society both makes a statement and offers a tool to media subjects to begin to control their own destinies. Without it, we risk continuing to subject those who were simply growing up to recurring and perhaps endless reliving of difficult periods in their lives or periods that are no longer representative of who they are today. Returning to the Larry Rivers saga puts this conclusion in perspective: "[Larry Rivers's daughter] Ms. Tamburlini . . . said she has spent several years in therapy trying to deal with the effect of her father's behavior. "I don't want it out there in the world," she said. "It just makes it worse."[55] She should be able to make sure these videos that feature her at a critical juncture of her life are not "out there," rather than begging someone else to "do the right thing" by her.[56] This proposal would play a part in allowing her to do that.

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[55] Taylor, *supra* note 21.

[56] *Id.*